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IN THE
COURT OF APPEALS OF INDIANA

CHARLES E. PERKINS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A04-0606-CR-290
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable William T. Means, Judge
Cause No. 71D04-0010-CF-466

October 19, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Charles E. Perkins appeals his maximum sentences for robbery, theft, and criminal confinement and his twenty-year habitual offender enhancement. Specifically, he contends that the trial court relied on an improper aggravator and overlooked two mitigators, that his sentence is inappropriate, and that the trial court erred when it imposed a separate sentence based on the habitual offender finding, rather than using his habitual offender status to enhance his sentence for an underlying felony conviction. Although we find that the trial court did not abuse its discretion in sentencing Perkins and that his sentence is not inappropriate, the court did err by imposing a separate sentence based on Perkins' habitual offender finding. We therefore remand the case with instructions for the trial court to specify to which of the three sentences the habitual offender enhancement applies.

Facts and Procedural History

On October 4, 2000, Perkins went to Honker's Restaurant in South Bend, Indiana, where he worked, and used a gun to force an employee to give him money from the cash drawer. Perkins then forced that employee and another employee into the restroom and ordered them to stay there. The gun Perkins used in these crimes was taken from his uncle without permission.

The State charged Perkins with Count I: Class B felony robbery; Count II: Class D felony theft; and Count III: Class B felony criminal confinement. The State later added Count IV: habitual offender, which alleged that Perkins had two prior convictions for robbery, one in 1993 and the other in 1997. Thereafter, Perkins pled guilty to Counts

I-IV as charged. The plea agreement provided that the parties were free to argue for a sentence at the hearing except that the State would take no position regarding Count IV. The State also agreed to dismiss a petition to revoke probation that was pending against Perkins in another cause number.

At the beginning of the December 2001 sentencing hearing, Perkins' attorney advised the trial court that, as reflected in the pre-sentence investigation report, Perkins has "a relatively significant history in his past." Sent. Tr. p. 3-4. Specifically, the PSI shows that Perkins has the following criminal history. In 1991, Perkins was convicted of felony burglary and placed on probation. In 1993, Perkins was convicted of two counts of robbery and one count of attempted robbery—all felonies—and sentenced to an aggregate term of eight years in the Indiana Department of Correction ("DOC") with two years suspended to probation. In 1996, Perkins was convicted of criminal conversion and sentenced to thirty days in the county jail. In 1997, Perkins was convicted of felony robbery and sentenced to twelve years in the DOC, two of which were suspended to probation. Shortly after being released to probation in 2000, the State filed a petition to revoke his probation,[1] which the State agreed to dismiss as part of the plea agreement in this case. Perkins was still on probation when he committed the instant offenses. Before pronouncing sentence, the trial court explained:

> Well, I think that – I think that the – it seems to me that the recommendation of the Probation Department is the correct one. I think that he had a Robbery in 1993, another Robbery in 1996 [convicted and sentenced in 1997]. Now, we've got a Robbery in 2000. It just occurs to

[1] The record shows that the State filed this petition to revoke Perkins' probation based on his "failing East Race Community Corrections (Riverside)." Appellant's App. (Vol. II) p. 4.

> me that three strikes and you're out. He's had his opportunity. In fact, he was on probation for the '96 Robbery when this occurred. I understand that's to be dismissed with the PTR.

Id. at 7. The trial court then sentenced Perkins to the maximum term of twenty years for Count I, the maximum term of three years for Count II, and the maximum term of twenty years for Count III.[2] The trial court said, "And I state the reason[] for the enhancement is the defendant's criminal record. Particularly, two prior crimes, Robbery, of the same nature as this." *Id.* at 8. For the habitual offender finding, the trial court sentenced Perkins "to 20 years, which is to run consecutively to those sentences imposed in I, II, and III, which are to run concurrently." *Id.* This belated appeal ensues.

Discussion and Decision

Perkins appeals his sentence. First, he contends that the trial court relied on an improper aggravator and overlooked two mitigators. Second, he contends that his sentence is inappropriate. Last, he contends that the trial court erred when it imposed a separate sentence based on the habitual offender finding, rather than using his habitual offender status to enhance his sentence for an underlying felony conviction. We address each issue in turn.

I. Aggravators and Mitigators

First, Perkins contends that the trial court relied on an improper aggravator and overlooked two mitigators. In general, sentencing lies within the discretion of the trial court. *Vazquez v. State*, 839 N.E.2d 1229, 1232 (Ind. Ct. App. 2005), *trans. denied*. As

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[2] At the time Perkins committed these crimes and was sentenced, Indiana's presumptive sentencing scheme was in effect.

such, we review sentencing decisions only for an abuse of discretion, including a trial court's decision to increase the presumptive sentence because of aggravating circumstances. *Id.* When enhancing a sentence, a trial court must: (1) identify significant aggravating and mitigating circumstances; (2) state the specific reasons why each circumstance is aggravating or mitigating; and (3) evaluate and balance the mitigating circumstances against the aggravating circumstances to determine if the mitigating circumstances offset the aggravating circumstances. *Id.* The trial court is not required to find the presence of mitigating circumstances. *Haddock v. State*, 800 N.E.2d 242, 245 (Ind. Ct. App. 2003). When a defendant offers evidence of mitigators, the trial court has the discretion to determine whether the factors are indeed mitigating, and the trial court is not required to explain why it does not find the proffered factors to be mitigating. *Id.* We examine both the written sentencing order and the trial court's comments at the sentencing hearing to determine whether the trial court adequately explained its reasons for the sentence. *Vazquez*, 839 N.E.2d at 1232.

Perkins first argues that the trial court erred by identifying as an aggravating circumstance his 1993 and 1997 robbery convictions, which were also used to support his habitual offender finding. It is true that the felonies supporting a habitual offender finding cannot, standing alone, be relied upon as the aggravating factor of a prior criminal record to enhance a sentence. *See McVey v. State*, 531 N.E.2d 458, 461 (Ind. 1988); *Waldon v. State*, 829 N.E.2d 168, 182 (Ind. Ct. App. 2005), *reh'g denied*, *trans. denied*. However, the record shows that the trial court found Perkins' entire criminal history—not just his two robbery convictions—as an aggravator. At the sentencing hearing, the trial

court stated, "And I state the reason[] for the enhancement is the defendant's *criminal record*. Particularly, two prior crimes, Robbery, of the same nature as this." Sent. Tr. p. 8 (emphasis added). In addition, Perkins' sentencing order provides, "Enhancement due to [Perkins'] *prior history*." Appellant's App. p. 54 (emphasis added). As detailed above, Perkins has several convictions in addition to his 1993 and 1997 robbery convictions. Because Perkins' sentences were not enhanced due solely to his 1993 and 1997 robbery convictions, the trial court did not abuse its discretion in finding Perkins' criminal history as an aggravator. *See Darnell v. State*, 435 N.E.2d 250, 256 (Ind. 1982) (noting that it is proper for a trial court to enhance a sentence upon consideration of a defendant's criminal history when the trial court considers more than just the prior felonies used in the habitual offender count).

Perkins next argues that the trial court erred by failing to identify his guilty plea as a mitigator.[3] "[A] defendant who willingly enters a plea of guilty has extended a substantial benefit to the [S]tate and deserves to have a substantial benefit extended to him in return." *Francis v. State*, 817 N.E.2d 235, 237 (Ind. 2004) (quotation omitted). "A guilty plea demonstrates a defendant's acceptance of responsibility for the crime and extends a benefit to the State and to the victim or the victim's family by avoiding a full-

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[3] The State wrongly notes in its appellate brief that Perkins failed to argue this mitigator at the sentencing hearing. To the contrary, Perkins' attorney made the following argument to the trial court:

> Your Honor, I just want to point out to the Court a mitigating factor would be that Mr. Perkins entered into a plea. Certainly, whatever that's worth. We did not have to go to the trial in this particular matter.

Sent. Tr. p. 7.

blown trial." *Id*. at 237-38. However, a trial court does not abuse its discretion by not finding a guilty plea as a mitigating factor when a defendant receives a substantial benefit for pleading guilty. *Sensback v. State*, 720 N.E.2d 1160, 1165 (Ind. 1999); *see also Francis*, 817 N.E.2d at 238 n.3.

Although Perkins pled guilty to Counts I-IV as charged, the plea agreement provides that the State agreed to dismiss a petition to revoke probation against Perkins in another cause number. Perkins does not acknowledge this benefit that he received in either of his appellate briefs. Because Perkins received a benefit by pleading guilty, the trial court did not abuse its discretion in failing to identify Perkins' guilty plea as a mitigator. *See Banks v. State*, 841 N.E.2d 654, 658-59 (Ind. Ct. App. 2006) ("Pursuant to Banks's plea agreement, and as the trial court was made aware at sentencing, the State dismissed a petition to revoke probation filed against Banks in another criminal case. Because Banks had already received some benefit in exchange for his guilty plea, Banks was entitled to little, if any, mitigating weight for it at sentencing. Thus, we find that the trial court's omission in this regard was harmless error.") (internal citation omitted), *trans. denied*.

Last, Perkins argues that the trial court erred by failing to identify his drug abuse and need for drug treatment as a mitigator. An allegation that the trial court failed to find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Vazquez*, 839 N.E.2d at 1234. Although there is evidence in the record that Perkins has a long-standing drug problem and that he committed this crime to obtain drug money, Perkins has failed to show that his drug

abuse and need for drug treatment is a significant mitigator in this case. This is especially so given Perkins' failure to seek drug treatment up until this point. The trial court did not abuse its discretion in failing to identify Perkins' drug abuse and need for drug treatment as a mitigator.

II. Inappropriate Sentence

Next, Perkins contends that his sentence is inappropriate in light of the nature of the offenses and his character. Indiana Rule of Appellate Procedure 7(B) states: "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." "Although appellate review of sentences must give due consideration to the trial court's sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied." *Purvis v. State*, 829 N.E.2d 572, 587 (Ind. Ct. App. 2005) (internal citations omitted), *trans. denied*, *cert. denied*, 126 S. Ct. 1580 (2006). After due consideration of the trial court's decision, we cannot say that Perkins' sentence is inappropriate.

Turning first to the nature of the offenses, Perkins, who was on probation and armed with a gun he took from his uncle without permission, went to Honker's Restaurant, where he worked, and used the gun to force an employee to give him cash from the cash drawer. Perkins wanted the money to buy drugs. He then forced two employees into the restroom and ordered them to stay there. Perkins committed these crimes, while armed with a gun, against his own employer and co-workers.

As for Perkins' character, Perkins has a significant criminal history. Courts in the past have shown Perkins leniency by placing him on probation, only to have him later return to a life of crime. Perkins also has a drug problem, for which he claims he wants treatment. And although Perkins pled guilty to Counts I-IV as charged, the State agreed to dismiss a petition to revoke probation against Perkins in another cause number. In light of the nature of the offenses and Perkins' character, we decline to exercise our sentencing authority in this case and reduce each of Perkins' sentences to the presumptive term and his habitual offender enhancement to ten years, as Perkins requests.

III. Habitual Offender Sentencing

Last, Perkins contends that the trial court erred when it imposed a separate sentence based on the habitual offender finding, rather than using his habitual offender status to enhance his sentence for an underlying felony conviction.[4] A habitual offender finding is not a conviction for a separate crime, so a sentence upon such a finding is not to be imposed as consecutive to a sentence imposed for an underlying felony conviction. *Edwards v. State*, 479 N.E.2d 541, 548 (Ind. 1985); *see also Anderson v. State*, 774 N.E.2d 906, 914 (Ind. Ct. App. 2002). Rather, a habitual offender finding provides for the enhancement of a sentence imposed for conviction on an underlying felony. *Edwards*, 479 N.E.2d at 548; *Anderson*, 774 N.E.2d at 913. Also, where, as here, there are two or more underlying felonies, the trial court must specify the underlying felony to which the enhancement applies. *Edwards*, 479 N.E.2d at 548; *Anderson*, 774 N.E.2d at

[4] The State does not respond to this argument in its brief.

913. We therefore remand this case with instructions for the trial court to specify to which of the three sentences the habitual offender enhancement applies.

Affirmed in part, reversed in part, and remanded.

BAKER, J., and CRONE, J., concur.